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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
Civil Action No. 08-1288

In Regard to the Matter of:

Bayside State Prison
Litigation

OPINION/REPORT
OF THE
SPECIAL MASTER

KENNETH WEST

-vs-

WILLIAM H. FAUVER, et al,
Defendants.

* * * *

THURSDAY, OCTOBER 1, 2009

* * * *

BEFORE THE HONORABLE JOHN W. BISSELL, SPECIAL MASTER

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5 Transcript of proceedings in the above
6 matter taken by Theresa O. Mastroianni, Certified
7 Court Reporter, license number 30X100085700, and
8 Notary Public of the State of New Jersey at the
9 United States District Court House, One Gerry Plaza,
10 Camden, New Jersey, 08102, commencing at 11:36 AM.
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1 JUDGE BISSELL: We are reopening
2 proceedings in the matter of Kenneth West, docket
3 number 08-1288 and the following will constitute the
4 Special Master's determination regarding his
5 complaint.

6 This opinion/report is being issued
7 pursuant to the directives of the Order of Reference
8 to a Special Master and the Special Master's
9 Agreement and the guiding principles of law which
10 underlie this decision to be applied to the facts
11 upon which it is based as set forth in the jury
12 instructions in the Walker and Mejias jury charges to
13 the extent applicable to the allegations of Mr. West.

14 As finalized after review under Local
15 Civil Rule 52.1, the transcript of this oral opinion
16 will constitute the written report required by
17 paragraph seven of the Order of Reference to a
18 Special Master.

19 Mr. West was housed in F Unit at the
20 time of an incident or one might call a progressive
21 series of incidents thereafter occurring on the 25th
22 of August, 1997 toward the end of the lockdown
23 period.

24 The triggering incident in the dayroom
25 of F Unit at that time I find is most accurately and

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1 credibly described by the testimony of then
2 Corrections Officer Recruit Shirley Tozer, T-O-Z-E-R,
3 now Shirley Royal, when she testified on March 10th,
4 2009. The excerpt involved here appears between
5 pages 196 and 200 of the transcript generated at that
6 hearing on that date.

7 The questioning begins on this subject:

8 "Question: Sitting here in this
9 courtroom, do you recognize Inmate Kenneth West?

10 "Answer: Yes.

11 "Question: Do you remember what the
12 charge was that you wrote against Inmate Kenneth West
13 and the circumstances surrounding it?

14 "Answer: .402, being in an
15 unauthorized area.

16 "Question: Can you tell us why you
17 wrote that charge?

18 "Answer: The facility had imposed a
19 red line system, put red tape in many, many places
20 and the inmates were not supposed to cross over those
21 red lines, or even actually step on them.

22 "Question: Was that system implemented
23 after the death of Fred Baker?

24 "Answer: Yes.

25 "Question: And do you know what the

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1 purpose of that was, why they implemented that
2 system?

3 "Answer: Officer safety, I would
4 imagine.

5 "Question: Was it to sort of give some
6 distance?

7 "Answer: To keep you out of the
8 space -- the direct space, you know.

9 "Question: Between an officer and an
10 inmate?

11 "Answer: Yes.

12 "Question: Okay. Do you remember
13 specifically when that red line system was put in
14 place? Do you have a recollection?

15 "Answer: I can only say August.

16 "Question: Okay. Now, August 25th,
17 1997, you told us you were working second shift in F
18 Unit; is that correct?

19 "Answer: Yes.

20 "Question: And did there come a time
21 when there was an incident with Inmate West that led
22 to a charge?

23 "Answer: Yes.

24 "Question: Can you tell us what you
25 recall?

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1 "Answer: The inmate approached the
2 area, came across the red line, and when he was told
3 that he couldn't get on to the red line, he was
4 agitated by that and walked away, and called me an
5 asshole.

6 "Question: Do you remember why he
7 entered the area?

8 "Answer: He, according to what I
9 recall, he was bringing mail, maybe to be mailed. I
10 don't think he was picking up mail. He was bringing
11 mail to be mailed out.

12 "Question: And you were there at the
13 desk or the podium?

14 "Answer: Yes.

15 "Question: And was it a podium, was it
16 a desk, how would you describe the setup?

17 "Answer: Podium, tall, like a work --
18 a gray metal -- I don't know what they really are
19 technically called, but we called them a podium.

20 "Question: And was there a chair for
21 you to sit at?

22 "Answer: Yeah, there is usually a
23 stool, couple chairs, plastic chair, maybe.

24 "Question: But this podium would be
25 higher than a normal table or desk?

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1 Answer: Oh, yes. If I'm standing at
2 the podium at my height, my eyes would just come
3 across the top of it.

4 "Question: And then the chair would
5 really be a stool of some type?

6 "Answer: Yes.

7 "Question: Now, do you recall actually
8 seeing Inmate West enter the area and cross the red
9 line?

10 "Answer: Yes.

11 "Question: Okay. And what did you do
12 when you saw that?

13 "Answer: I told him he was on the red
14 line, and that's obviously restricted area,
15 unauthorized area for any convict to be in.

16 "Question: And you told him that
17 because that's what the rule was, that he was not
18 supposed to be in that area, correct?

19 "Answer: Yes.

20 "Question: And then his response, I
21 think you said he sort of became agitated in some
22 type?

23 "Answer: Yes.

24 "Question: In some fashion? And can
25 you tell us more of what you recall?

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1 "Answer: He called me an asshole, and
2 walked to the phones and proceeded to attempt to make
3 a phone call.

4 "Question: Okay. Now, when you first
5 told him that he had crossed the line, at that point,
6 was it your intention to issue a disciplinary of any
7 type?

8 "Answer: No. Not at all.

9 "Question: After he called you an
10 asshole, did you then decide that you were going to
11 write a disciplinary for him coming across the red
12 line?

13 "Answer: Because of his attitude and
14 agitation, not necessarily referring to me or anybody
15 as an asshole."

16 That's a description of the events at
17 that time. Ms. Tozer further testified, and once
18 again I believe accurately, that Mr. West was asked
19 to go to his bunk to get his ID which he did and
20 return to the area. And at this time two officers
21 essentially on a roving patrol, Officers Koerner and
22 Fronczek were there, they cuffed Mr. West and held
23 him in the day room without any particular incident
24 waiting for an escort unit to arrive to take him to
25 lockup.

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1 That escort unit did arrive, it was a
2 Bayside Prisoner Response Team, not a SOG team,
3 although they were geared up, it appears. That
4 response team consisted of Officers David Vastano,
5 V-A-S-T-A-N-O, Ronald Callahan, William Nessen,
6 N-E-S-S-E-N, Arwin Dusenko, D-U-S-E-N-K-O, and
7 William Ruff, and their supervisor, Sergeant Donald
8 Zawojski.

9 At this point the evidence somewhat
10 diverges in connection with what occurred when the
11 response team endeavored to secure Mr. West for a
12 transport to B Unit lockup.

13 The events in question eventually led
14 to an Internal Affairs investigation and a
15 significant point or possible event in that
16 investigation focused around whether or not the
17 inmate, Mr. West, kicked one of the officers in the
18 prison response team, namely Officer Ruff.

19 A number of statements were taken, most
20 of them introduced into evidence, either with
21 separate exhibit numbers or as a part of P-172 which
22 is the full administrative investigation report from
23 Internal Affairs of this incident.

24 Reports from Mr. Koerner with regard to
25 when Mr. West allegedly kicked Mr. Ruff included a

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1 statement that it occurred when they were exiting F
2 Unit, and another one when the response team escorted
3 him.

4 A report of Sergeant Zawojski, by
5 implication at least, indicated that the kick
6 actually happened in F Unit. And another report of
7 his says: "As we began to remove Inmate West from
8 the corner of F Unit, he kicked Officer Ruff in the
9 knee".

10 Officer Ruff, in one of his reports,
11 indicated that he was kicked in the right leg from
12 behind. Once again, with an inference that it
13 occurred in F Unit itself in the immediate vicinity
14 of their exiting the premises.

15 Officer Nessen said this occurred as we
16 started to escort Mr. West. Officer Vastano,
17 interestingly enough in his report appearing at Bates
18 stamp page number 5902 in P-172, did not mention that
19 the kicking occurred.

20 Another officer's report appearing at
21 5903 says, while we were escorting the inmate to
22 lockup. Mr. Callahan indicated it was while we were
23 attempting to take control of the inmate for
24 transport to lockup. Endeavoring to read these
25 reports and make a determination at least as to what

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1 the response team's position was leads me to draw the
2 inference, I think appropriately so, that according
3 to them, this incident occurred, and the kicking
4 actually did, in fact, take place while they were in
5 F Unit, albeit at the point of exiting.

6 Ms. Tozer, however, in the day room, in
7 the immediate vicinity of this event, whose decision
8 it was to write a charge (even though it may not yet
9 have been written), and in a position definitely to
10 observe what was taking place in that immediate area,
11 makes no mention whatsoever of Inmate West kicking
12 Mr. Ruff or any other officer. Her statement, I
13 think marked into evidence independently as Exhibit
14 D-620, but nevertheless also appearing as a part of
15 P-172 beginning at Bates stamp page 5894, after her
16 discussion of the preliminary events continues on
17 page 5895: "At this time I saw the response team
18 enter the unit and escort Inmate West out of the
19 unit, down the steps and onto the grassy area in the
20 direction of A/B Unit. I then returned to my normal
21 duties."

22 So it's clear from that statement
23 relatively contemporaneous, September 11th, 1997,
24 that she did observe this segment at least of Mr.
25 West's custody by the response team. She continues

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1 in that statement and I continue this quote: "At no
2 time did I witness any unusual incidents. There was
3 at no time any assaults by compound patrol or the
4 response team toward this inmate nor did I witness
5 the assault of any officer from the response team or
6 compound patrol by this inmate."

7 Now, in the course of her testimony
8 here in court Ms. Tozer, one might say, somewhat
9 compromised that statement and in some instances
10 indicated that she may not have been watching these
11 events surrounding Mr. West quite as completely as
12 she was, ostensibly due to other duties. I'm not
13 exactly sure why this approach took place. Ms. Tozer
14 has been retired from Bureau of Prisons employment
15 for some time. Perhaps it's the product of her
16 realizing that her written statement contradicted
17 those of others. But in any event, certainly I find
18 it more credible that her statement at the time, when
19 not a part of this response team and with no need, if
20 you will, to get the story straight, stated very
21 clearly that at the same point in time when the other
22 members of the response team are alleging that
23 Mr. West kicked Mr. Ruff, she saw no such thing.

24 And so I reach the determination here
25 that that didn't happen, that he did not kick Mr.

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1 Ruff.

2 I find further that there were, indeed,
3 injuries inflicted by the response team upon Mr. West
4 as reflected in P-171 which are the photographs,
5 albeit by photocopy, and also as discussed and
6 described at some length in the Internal Affairs
7 investigation report.

8 I don't think it's necessary to
9 reiterate those at length, that report is in evidence
10 and can be consulted for that purpose.

11 These injuries happily were relatively
12 minor injuries, cuts and bruises sustained due to the
13 employment of excessive and, frankly, unnecessary
14 force in the course of his transport to the lockup
15 unit.

16 Upon arrival at the lockup unit I find,
17 as Mr. West testified, that his shoulder, which was
18 indeed injured as the pictures and analysis reflect,
19 was slammed into the door of the unit in order to
20 open it. This, once again, is consistent with a
21 rough and unnecessary and excessive use of force in
22 the course of the transport of this plaintiff.

23 I find that the reports and testimony
24 of the response team members that the plaintiff was
25 combative in the course of his transport is not

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1 credible and like the fabricated kicking incident,
2 was employed here as a shield, so to speak, for their
3 own misconduct and use of excessive force in the
4 transport.

5 However, I find, as reflected in the
6 photographs taken on the 27th of August, some
7 two days later, that the injuries depicted in those
8 photographs, including those to plaintiff's shoulder
9 resulting from the use of it to open the door into
10 the unit, are the injuries which, in fact, occurred.
11 I do not find it credible as described by Mr. West
12 that other events transpiring supposedly on that day
13 (such as his head being slammed into the B Unit
14 podium) and later, upon his imminent departure to
15 Trenton State Prison, in fact, occurred. I find
16 this, frankly, is an effort to gild the lily and
17 enhance his claims in this matter against the
18 facility and its officers.

19 I do not find that these efforts, under
20 any legal or equitable doctrine, bar his recovery for
21 the injuries which he did, in fact, sustain. But I
22 do not find them credible to support the allegations,
23 among other things, that his head was slammed into
24 the podium and/or that he was otherwise mistreated in
25 the moments and minutes subsequent to his arrival at

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1 the facility.

2 He was, of course, seen by medical
3 personnel as best my recollection recalls, both on
4 the 25th in the evening itself and later on the 27th
5 with reports of the injuries actually sustained and
6 not those which he has fabricated.

7 With regard to specifically his alleged
8 assault by officers on the eve of his relocation to
9 Trenton State Prison, those are not substantiated
10 and, frankly, make no sense. Here is a man already
11 marked to some extent and with reports to that
12 effect. And for the officers at this point to
13 reassault him with the potential of leaving
14 additional evidence of assaults and injuries, which
15 would have to be revealed and reviewed in either an
16 exit medical exam from Bayside State Prison or an
17 intake medical exam at Trenton State Prison or both,
18 makes no sense and would indicate the willingness of
19 these custodial officers, now about to be rid of a
20 particular inmate, to run a substantial risk to their
21 own careers. And once again, I see no grounds for it
22 and it makes no inherent sense either. There is no
23 reason to take this risk as a matter of logic. And
24 with the claims of these injuries otherwise
25 unsubstantiated, I find that they have not been

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1 proven here.

2 There were also indications from the
3 record that, upon his arrival at Trenton State
4 Prison, now out of the clutches, if you will, of
5 Bayside and its officers, he sought no follow-up
6 medical treatment. One would have expected such a
7 request had he been beaten only hours before.

8 As far as the scope and extent of his
9 injuries are concerned, Mr. West did have lingering
10 shoulder pain over time, although it has lessened by
11 now. It did restrict his weight-lifting activities,
12 but there was no significant permanency from any of
13 these injuries and, in fact, when being admitted to
14 Southwoods State Prison slightly less than a year
15 later, on or about the 18th of June of 1998, he made
16 no complaints of any lingering injuries afflicting
17 him at that time.

18 There was, therefore, to the extent
19 described and found above indeed excessive,
20 unnecessary and sadistic force employed upon Mr. West
21 within the contemplation of those legal principles.
22 However, in light of the fact that the injuries and
23 hence this punishment inflicted upon him in the
24 course of his transit to the lockup unit was not
25 prolonged, repeated or resulting in extremely severe

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1 injuries, I find, therefore, that while this is
2 actionable for the recovery of compensatory damages,
3 I do not find that this assault visited upon him rose
4 to the level of being so egregious as to support a
5 claim for punitive damages, at least against the
6 identified officers here; once again, as the punitive
7 damages standard is applied in the jury instructions
8 mentioned above and incorporated here by reference.

9 I realize, of course, that there may
10 come a time when an issue arises as to whether there
11 is any significance of this conduct with regard to
12 the establishment of supervisory liability and/or
13 punitive damages in that respect. However, that
14 awaits another day. And I will impose no punitive
15 damages here.

16 Finally, although not every item of
17 evidence has been discussed in this opinion/report,
18 all evidence presented to the Special Master was
19 reviewed and considered.

20 This is a case (unlike most) where we
21 do, indeed, have identifiable defendants, namely the
22 members of the Bayside State Prison Response Team. I
23 might add that I find no basis for any liability
24 against either the podium officer identified
25 previously or the two initial responders who placed

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1 this man in handcuffs. The injuries were inflicted
2 by the response team. I find that the injury
3 inflicted here was actionable. I find that although
4 originally and initially acute, it has not remained
5 significantly permanent with any major continuing
6 pain or significant restriction on Mr. West's
7 activities.

8 Accordingly, I recommend in this report
9 that the district court enter an award of
10 compensatory damages in the amount of \$4,500 in Mr.
11 West's favor and that that judgment may specifically
12 be entered in this matter against the members of the
13 response team, David Vastano, Ronald Callahan,
14 William Nessen, Arwin Dusenko, William Ruff and
15 Donald Zawojski to the extent that any of them are
16 named defendants in this action. That frankly is
17 something that's not at my fingertips, but if they
18 are, then the case has been proven as to them.

19 (Hearing Adjourned)
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C E R T I F I C A T E

I, Theresa O. Mastroianni, a Notary Public and Certified Shorthand Reporter of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcript of the testimony as taken stenographically by and before me at the time, place, and on the date hereinbefore set forth.

I DO FURTHER CERTIFY that I am neither a relative nor employee nor attorney nor counsel of any of the parties to this action, and that I am neither a relative nor employee of such attorney or counsel, and that I am not financially interested in the action.



Theresa O. Mastroianni, C.S.R.
Notary Public, State of New Jersey
My Commission Expires May 5, 2010
Certificate No. XI0857
Date: October 1, 2009

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